

United States of America vs. Proteccion Technica Ecologica, Inc. and Compania Ganadera Del Sur, Inc. - Judicial Settlement Document

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Attached is an original Amended Consent Decree with Proteccion Technica Ecologica, Inc. ("Proteco") and Compania Ganadera Del Sur, Inc. ("Ganadera") (hereinafter collectively referred to as "Defendants") with respect to the Proteco facility located in Penuelas, Puerto Rico. Pursuant to existing agency delegations, **this Amended Consent Decree is being provided for your concurrence but not your signature.**

The Proteco facility is a 35 acre facility which began operations as a hazardous waste treatment storage and disposal (TSD) facility in 1975. Although Proteco lost its authority to operate as a TSD in 1990, the Proteco facility still has thirteen hazardous waste units. These units are subject to closure pursuant to hazardous waste regulations. Because these units will be closed with waste on place, the facility will be subject to a post closure permit.

This amended Consent Decree will supersede the Consent Decree originally entered into by the parties (the "Original Consent Decree") resolving a Complaint filed against the same Defendants in October, 1986 pursuant to Section 3008 of the Resource Conservation and Recovery Act, as amended ("RCRA"). The Original Consent Decree was entered by the Court in October 1987 and required that the Defendants pay the United States a civil penalty and perform certain injunctive relief. In February, 1991 the United States filed a Motion to enforce the Original Consent Decree and to Amend and Supplement the (underlying) Complaint. This Amended Consent Decree resolves that Motion, as well as motion practice that ensued regarding Defendant Proteco's compliance with the Original Consent Decree. After you have reviewed and concurred in this settlement, the Regional Counsel will sign the Decree, please and transmit it to the Department of Justice.

ENFORCEMENT BACKGROUND

In October 1986 the United States filed a Complaint pursuant to Section 3008 of RCRA against three Defendants regarding the Proteco facility located in Penuelas, Puerto Rico. These Defendants were: 1) Proteco (the operator); 2) Ganadera (the landowner); and 3) Dr. Fernandez (the sole stock owner). The Complaint alleged that these three Defendants violated numerous provisions of RCRA, and that Proteco was in violation of two Administrative Consent Orders issued to it by EPA in 1985. The United States, Proteco and Ganadera signed a Consent Decree resolving the 1986 Complaint which was approved and entered by the Court in October 1987 (referred to as the Original Consent Decree). Fernandez was released with prejudice. This Original Consent Decree required the Settling Defendants to pay civil penalties in the amount of

\$850,000, plus interest, in installments over four years, to undertake numerous actions to comply with RCRA, and to build specific hazardous waste facilities by July 27, 1988.

During the period of time between 1989 and 1991, Proteco filed numerous Petitions to the Court seeking relief from the Consent Decree. More specifically, due to financial difficulties Proteco sought relief from its penalty (seeking to use these monies for closure) and construction obligations. Ultimately, the Court ordered Proteco to pay the penalty payments into a Court escrow account but did not indicate whether these funds would be used for closure or for penalty. With interest, there is presently over \$700,000 in this account. In addition, the Court ordered Proteco to withdraw its Part A and B permit application which Proteco did. As a result, on May 15, 1990 Proteco lost its interim status to operate a treatment storage or disposal hazardous waste facility. The facility is still however subject to closure requirements and does operate a non-hazardous waste business.

In February, 1991, the United States filed a Motion to Amend and Supplement the Complaint, to Enforce the (Original) Consent Decree and to require Defendants to furnish financial information. The United States alleged 16 new violations of RCRA, including claims that Proteco: exceeded the design capacities specified in Part A of its permit application; stored hazardous waste in non-designated areas; exceeded the design capacities specified in Part A of its permit application; failed to update its contingency plan as required by 40 C.F.R. § 265.52; and failed to retain the land disposal notifications received from generators as required by 40 C.F.R. § 268.7. Proteco opposed all of the United States' Motions. The Court has never ruled on the Government's Motion to Enforce the Decree and to Amend the Complaint.

SETTLEMENT IN PRINCIPLE/INABILITY TO PAY

In February 1993, the parties reached a settlement in principle. The terms of this settlement were outlined in seventeen points and set forth in a document entitled General Terms of Settlement. Essentially, under these General Terms of Settlement, Proteco would, at its own expense and in phases, close the hazardous waste units at the facility pursuant to EPA approved closure plans, comply with any post closure requirements including obtaining a post closure permit, fund closure and post closure escrow accounts on a monthly basis and pay the United States a civil penalty consisting of the amount in the Court Ordered escrow account, \$591,111.16, plus as well as any interest earned by that account balance.¹ These actions and penalty payment would be in settlement of the allegations listed in the United States Motion to Amend, as well as outstanding obligations under the Original Consent Decree. In addition, according to the General Terms of Settlement the parties would negotiate the terms of an Amended Consent Decree which would fully resolve the present actions but the United States would not lodge the Amended Consent Decree until Proteco developed approvable closure plans. The United States felt that by delaying the lodging of the Amended Consent Decree and by not resolving the Government's large claim for stipulated penalties, it could pressure Proteco to move forward with the closure and break Proteco's prior pattern of not complying with legally enforceable documents, as well as

ensure that the funds for the closure would be available if needed.

These settlement terms, which allowed phased closure, phased funding of closure trust funds and a mitigated penalty, were based on Proteco's demonstration of an inability to pay.

The financial unit of the Department of Justice's Anti-trust Division reviewed Proteco's financial status on a number of occasions through out the course of this litigation. Indeed, the United States moved the Court to obtain additional financial information so that it would be in sound position to continually evaluate Proteco's financial status. This motion was granted and throughout the course of this litigation Proteco has been providing EPA and DOJ with financial information. Based on these financials, the Government is convinced that Proteco has a limited financial means. According to the Department of Justice's analysis, Proteco would be unable to finance the closure of all its hazardous waste units and simultaneously pay the money owed to the United States under the Original Consent Decree, much less the stipulated penalties due for violating the Original Decree. Accordingly, the United States agreed to settling this action for a mitigated penalty amount (\$591,111.16 plus interest) and a phased closure of the facility.

AMENDED CONSENT DECREE

The General Terms of Settlement discussed above served as the basis for drafting the Amended Consent. As stated above, the parties agreed that the Amended Consent Decree would not be entered until Proteco had developed approvable closure plans. At the same time however, the United States was very concerned about Proteco implementing closure as soon as practicable. Accordingly, the General Terms of Settlement and the draft Amended Consent Decree contained obligations which Proteco could implement prior to the entry to the Amended Consent Decree. Proteco has complied with these obligations. For example, as will be discussed in more detail below, Proteco has been funding a closure escrow account, has developed an approvable closure plan for its facility, and has completed a drum removal.

Pursuant to the draft Amended Consent Decree, Proteco was required to fund, initiate and complete a drum removal as phase 1 of closure. The draft Amended Decree required that the removal be initiated by February 1, 1993 and be completed by May 1, 1994. Proteco was required to fund this removal by either spending \$40,000 each month on, or placing the same amount into an escrow account for, the drum removal. Proteco complied with these requirements and timely completed a drum removal (approximately 1000 drums).

The draft Amended Consent Decree further outlined phases 2 and 3 of closure. Under phases 2 and 3 of closure, Proteco will be capping the remaining hazardous waste units at the site. To fund these phases of closure, Proteco was required to place \$40,000 into a closure escrow account on a monthly basis starting on May 1, 1994 until that fund, in conjunction with Proteco's closure trust fund, had sufficient monies to cover the estimated cost of closure. (The closure escrow account is intended to supplement

Proteco's closure trust fund which had been primarily established pursuant to the regulations but only contains \$260,000.) The establishment of the closure escrow account enables Proteco to establish and have access to funds for closure. Proteco has been making these monthly deposits, thereby creating a fund, to pay for the full cost of closure. Proteco will implement its EPA approved closure plan using these funds.

Proteco's closure plan will likely incorporate the use of a corrective action management unit (CAMU) as authorized in 40 C.F.R. § 264.552. Subsequent to public comment and final EPA approval, the closure plan and CAMU will be incorporated into the Amended Consent Decree.

Because Proteco is closing hazardous waste units with waste left in place, it is also subject to post closure requirements. Accordingly, the Amended Consent Decree requires Proteco to establish a post closure escrow account on May 1, 1998 or by an otherwise EPA approved date. Again, given Proteco's limited resources, the Amended Consent Decree requires Proteco to make monthly deposits of sums certain into the escrow account until the estimated cost of post closure is met. Because post closure is significantly less costly than closure, payments will start at \$40,000 a month but, pursuant to a schedule in the Amended Decree, will be reduced first to \$30,000 and then to \$20,000 per month until the estimated cost of post closure has been set aside.

Regarding penalty, the Amended Consent Decree requires that Proteco pay a civil penalty of \$591,111.16, the amount of money placed in the Court's escrow account pursuant to the Court's July 31, 1991 Order. Any interest accumulated in this fund since 1991 will also be paid to the United States as a civil penalty. As stated above, this penalty amount reflects Proteco's demonstrated limited financial ability.

In total, since entry of the Original Consent Decree, Proteco will have paid a total penalty of \$913,111.16 (excluding the interest accumulated on the \$591,111.16). This sum includes the mitigated penalty amount of \$591,111.16 plus the penalty payments Proteco made under the Original Consent Decree thru April 1990. With the interest accumulated on the \$591,111.16, the total penalty payment will be almost \$1,200,000.

Finally, since this is an inability to pay settlement and because the owner of Proteco has often discussed selling his interests (including his long term lease of the facility), the Amended Consent Decree includes language regarding the potential sale of the assets or fifty percent of the stock of the corporation. (While Proteco is no longer in the hazardous waste business, the right to use the property retains value in light of its geology and location for the development of a solid waste business.) More specifically, if there is such a sale within one year of the date of the public notice of the proposed closure plan for the facility, the Amended Consent Decree requires Proteco to pay an additional civil penalty in the amount of \$225,671, the amount mitigated under the Original Consent Decree,² to the United States within thirty days of entry of the Amended Consent Decree or 60 days after completion of the transaction, whichever is later. This requirement was included in the Amended Decree to limit Proteco's ability to

take advantage of this mitigated settlement.

CONCLUSION

The EPA attorney and program staff involved in this case recommend that you concur on this Amended Consent Decree and return it to Walter Mugdan for signature and forwarding to the Department of Justice. While this has been a very lengthy process, the result was well worth the wait. Proteco has lost its interim status and is no longer authorized to manage hazardous waste at its facility. As part of the settlement Proteco has completed, at its own expense, a very large drum removal pursuant to an EPA approved closure plan. Further, this Amended Consent Decree insures that the facility is closed pursuant to EPA approved closure plans and that the Defendant, rather than the United States pays for this closure. The civil penalty assessed in this Amended Consent Decree is \$591,111.16, bringing the total penalty collected from Defendants under the Original and Amended Consent Decrees to \$913,111.16. With the interest collected on the \$591,111.16 however, the grand total penalty collected is almost \$1,200,000. In addition, if there is a sale of the facility within the specified time frame, the United States will collect an additional \$225,671 as a civil penalty.

Attachment